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ONE HUNDRED NINTH CONGRESS

# Congress of the United States

## House of Representatives

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## MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging  
Threats, and International Relations

From: Christopher Shays   
Chairman

Date: June 1, 2006

Re: Briefing memo for June 6, 2006 Subcommittee hearing.

Attached find the briefing memo required by Committee rules  
for the hearing entitled *9/11 Commission Recommendations:  
Balancing Civil Liberties and Security*. The hearing will  
convene June 6, 2006 at 2:00 p.m., room 2154 Rayburn House  
Office Building in Washington, D.C.

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June 1, 2006

## MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging Threats, and International Relations

From: Ms. Elizabeth Daniel, Professional Staff **ED**

Re: Briefing memo for the hearing *9/11 Commission Recommendations: Balancing Civil Liberties and Security* scheduled for June 6, 2006 at 2:00 p.m., room 2154 Rayburn House Office Building in Washington, D.C.

## PURPOSE OF THE HEARING

The hearing will examine the implementation status of the 9/11 Commission civil liberties recommendations within the context of broader 9/11 Commission recommendations.

## HEARING ISSUES

1. What is the implementation status of 9/11 Commission's civil liberties recommendations?
2. What steps can be taken to ensure a consistent balance between civil liberties and national security needs?

## **BACKGROUND**

In July 2004, the National Commission on Terrorist Attacks Upon the United States, better known as the 9/11 Commission, issued a report containing 41 recommendations for strengthening United States national security in order to prevent future terrorist attacks. Among these recommendations were three specifically targeted to protect civil liberties during a time of increased national security procedures:

- **As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared.**
- **The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.**
- **At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties. (Web Resource 1)**

A Congressional Research Service report states, "Read together, these recommendations called for a board to oversee adherence to presidential guidelines on information sharing that safeguard the privacy of individuals about whom information is shared, and adherence to guidelines on the executive's continued use of powers that materially enhance security." (Web Resource 2)

These civil liberties-related recommendations serve as a check in the context of the 9/11 Commission's broader message, which is to comprehensively strengthen U.S. national security. The Commission's most sweeping recommendations are threefold: to attack terrorists and their organizations;

to prevent the continued growth of Islamist terrorism; and to protect against and prepare for terrorist attacks. **(Web Resource 3)**

### **Congressional Action Timeline**

Almost immediately after the 9/11 Commission issued its report, the House of Representatives formed the 9/11 Commission Caucus to support the enactment of legislation, including the establishment of a Privacy and Civil Liberties Oversight Board at the White House. **(Web Resource 4)**

In September 2004, the Senate marked up S.2845, the Intelligence Reform and Terrorism Prevention Act of 2004, which included a robust Privacy and Civil Liberties Oversight Board. In October, S.2845 passed 96-2. **(Web Resource 5)**

Also in September 2004, the House marked up H.R. 10, the 9/11 Recommendations Implementation Act. The Judiciary Committee adopted an amendment that would have created the Board as an independent agency, but the amendment was omitted in October 2004 by the House Rules Committee. **(Web Resource 6)**

Following a House-Senate Conference report, P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act, was signed into law on December 17, 2004. In this law, the power of the Privacy and Civil Liberties Oversight Board was significantly weakened because the Board had no authority to subpoena federal agencies. The Congressional Research Service outlined the Board's structure and powers:

Located within the Executive Office of the President, the Board would consist of a chair, vice chair, and three additional members, all appointed by, and serving at the pleasure of, the President. Nominees for the chair and vice chair positions would be subject to Senate approval. While the board would have most of the review and advice responsibilities contained in the Senate-adopted version of the legislation, it would not have subpoena power, but was authorized to request the assistance of the Attorney General in obtaining desired information from persons other than federal departments and agencies.<sup>1</sup> [...] On December 7, the House, on a 336-75

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<sup>1</sup>The Congressional Research Service continues, "The eight privacy and civil liberties officers that the Senate-adopted version of the legislation would have established within specified departments and agencies

vote, agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote, clearing the intelligence reform legislation for the President's signature. On December 17, President George W. Bush signed the legislation into law. **(Web Resource 2)**

In March 2005, Representatives Christopher Shays (R-CT), Carolyn Maloney (D-NY) and Tom Udall (D-CO) introduced H.R. 1310, the Protection of Civil Liberties Act. **(Attachment 1)** This legislation sought to restore the provisions removed in the House-Senate Conference report, and established the Board as an independent agency.

In separate instances between May and December 2005, H.R. 1310 was submitted for consideration as an amendment to the Homeland Security Authorization Bill (H.R. 1817); the Intelligence Authorization Bill (H.R. 2475); the reauthorization of the USA PATRIOT Act (H.R. 3199); and the Border Protection, Antiterrorism, and Illegal Immigration Control Act (H.R. 4437), but in all instances debate was denied by the Rules Committee.

On March 16, 2006 H.R. 1310 was reintroduced as H.R. 5000, the 9/11 Commission Privacy and Civil Liberties Board Act, building on the original by adding a requirement that the White House commit a funding line item to the Board in its annual budget. As of late May this legislation is awaiting action by the Homeland Security Subcommittee on Management, Integration, and Oversight. **(Attachments 2-3)**

In May 2006, H.R. 5017, Ensuring Implementation of the 9/11 Commission Report Act, was introduced and contained language from H.R. 5000. **(Web Resource 8, Attachment 4)** The legislation includes a mechanism for executive branch agencies to report on their implementation progress. Once enacted into law, the relevant agencies must certify their completion of the law's requirements within thirty days, first submitting proof to an appropriate Congressional committee and subsequently receiving certification from the Government Accountability Office (GAO).

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were addressed in a sense of Congress provision stating "that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer." Numerous other federal agencies expediently developed privacy offices led by a Chief Privacy Officer. The Department of Homeland Security, in contrast to the White House Board, created a particularly comprehensive privacy office. **(Web Resource 7)**

## **The Public Discourse Project (PDP)**

Congressional efforts to implement 9/11 Commission recommendations are bolstered and complemented by the Public Discourse Project (PDP), an entity created in 2005 to oversee and evaluate efforts to implement or enact legislation for the Commission's recommendations. The PDP is an offshoot of the 9/11 Commission and is comprised of its former members.

### **(Web Resource 9)**

In December 2005, the PDP released a report card that harshly graded implementation progress for many of the Commission's 41 recommendations. Divided into three categories—Homeland Security and Emergency Response, Intelligence and Congressional Reform, and Foreign Policy and Nonproliferation—there were many more "D" and "F" grades issued than "A" and "B" grades. **(Attachment 5)** The PDP issued a "D" grade for implementation of information sharing recommendations, and another "D" for the Privacy and Civil Liberties Oversight Board. The Public Discourse Project report noted "little urgency in the creation of this Board."

### **(Web Resource 10)**

## **The White House Privacy and Civil Liberties Oversight Board**

In June 2005, President Bush named Ms. Carol E. Dinkins of Texas as Chairman and Mr. Alan Charles Raul of the District of Columbia as Vice Chairman of the Privacy and Civil Liberties Oversight Board, and also appointed members Mr. Lanny Davis of Maryland, Mr. Theodore Olson of Virginia, and Ambassador Francis X. Taylor of Maryland. The first four have careers in law; Ambassador Taylor has held senior positions within the Air Force and the State Department, and is now in the private sector. **(Web Resource 11)** Nominations for Ms. Dinkins and Mr. Charles were submitted to the Senate at the end of September, and a hearing was held November 8. On February 16, 2006, the Senate confirmed both.

Roughly fifteen months after its establishment was mandated by Congress through the Intelligence Reform and Terrorism Prevention Act of 2004, the first meeting of the Board took place March 14, 2006. At that time, members reviewed the National Security Agency's warrantless surveillance program and received a briefing on the Patriot Act by the Justice Department. As of late May 2006 the Board had convened on three more

occasions, and has met with and received briefings from senior Administration officials, senior officials at various federal departments and agencies, and representatives from nongovernmental policy and advocacy organizations. **(Web Resource 12)**

The structure of Board itself, as defined by the December 2004 House-Senate conference report, has received criticism for not being sufficiently independent to effectively conduct oversight, and for being a window dressing answer to the 9/11 Commission recommendation. The Board lacks the authority to issue subpoenas, inherently limiting its investigative power. Any Board information requests outside federal departments and agencies must go through the office of the Attorney General, who has the power to veto Board investigations. The Board is located within the Executive Office of the President, and the Board's members serve at the pleasure of the President. In the original version of its Fiscal Year 2007 budget, there was no line item given to the Privacy and Civil Liberties Board.<sup>2</sup> **(Attachments 6-9)**

H.R. 5000, the 9/11 Commission Privacy and Civil Liberties Board Act, addresses criticisms levied against the present structure and composition of the Board, and builds on the Protection of Civil Liberties Act. Specifically, H.R. 5000:

- **Gives the Board subpoena power.** Currently, the Board requires the permission of the Attorney General to issue a subpoena. Also, the Board lacks access to the private contractors hired to perform critical intelligence functions.
- **Creates the Board as an independent agency in the Executive Branch.** Currently the Board is in the Executive Office of the President.
- **Requires that all five members of the Board be confirmed by the Senate.** In present form, only the Chair and the Vice Chair will be confirmed.

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<sup>2</sup> In the FY2006 budget, the original allocation of \$750,000 for the Board had been increased to \$1.5m in an amendment co-sponsored by Representatives Shays, Maloney, and Udall. On February 14, 2006 Representatives Shays and Maloney sent Joshua Bolten, then Director of the Office of Management and Budget, a letter requesting information on funding plans for the office.

- **Requires that no more than three members can be from the same political party.** Currently there is no provision that ensures a bipartisan Board. Members Dinkins, Raul, Olson, and Taylor are Republicans; Davis is a Democrat.
- **Sets a term for Board members at 6 years.** Currently members serve at the pleasure of the President.
- **Creates the chairman's position as a full-time member of the Board.** This increases the likelihood that the Board will meet regularly.
- **Restores the qualifications of Board members that were originally included in the Senate bill.** This would require that members have prior experience with protecting civil liberties, among other things. Currently there are no such requirements.
- **Restores reporting requirements to Congress.** One of the main recommendations of the 9/11 Commission was the need for more Congressional oversight. Restoring the reporting requirement for semiannual reports help achieve this goal.
- **Requires each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.** Currently the law only expresses a sense of Congress that a privacy and civil liberties officer be established.
- **Requires that the President's annual budget contain a specific funding line for the Board.** The President's budget submission for Fiscal Year 2007 did not contain a funding line for the Board.

According to the White House website, issues that fall under the Board's purview broadly include:

“[advising] the President and other senior executive branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism. This includes advising on whether adequate guidelines, supervision, and oversight exist to protect these important legal rights of all Americans.



In addition, the Board is specifically charged with responsibility for reviewing the terrorism information sharing practices of executive branch departments and agencies to determine whether guidelines designed to appropriately protect privacy and civil liberties are being followed.” **(Web Resource 11)**

Over the past year, issues that fall under the jurisdiction of the Privacy and Civil Liberties Oversight Board have received a great deal of attention in the press. Among these issues are data mining and wiretapping.

Data mining, defined as federal agency use of large amounts of data to uncover hidden patterns and relationships, was originally designed to target financial waste. In May 2006, the Government Accountability Office (GAO) testified before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law that “agencies employing data mining took many steps needed to protect privacy (such as issuing public notices), but none followed all key procedures (such as including in these notices the intended uses of personal information).” **(Web Resource 13)**

Wiretapping by the National Security Agency (NSA) first came to light in late 2005, and the Senate Judiciary Committee held hearings in February 2006 at which Attorney General Alberto Gonzales defended the program. The NSA had been monitoring telephone calls between people in the United States and suspected Al Qaeda members. The program was criticized as being illegal and counter to constitutional separation of powers, and defended on legal grounds by the White House in January 2006. **(Web Resource 14)**

In the face of far-reaching and tangible national security concerns, when the federal government takes on a stronger and more powerful role, the issue of civil liberties has the potential to fall by the wayside or to become an afterthought. The authors of the 9/11 Commission Report foresaw such a possibility, recognized its danger, and sought to guard against it with three civil liberties protection recommendations. Issues of the past year have highlighted the value of their foresight, and also the importance of creating a strong national consensus on the balance of security and civil liberties.

The Subcommittee held a hearing August 23, 2004 entitled *The 9/11 Commission Recommendations on Public Diplomacy*. A second hearing was

held on September 22, 2004 entitled *Combating Terrorism: The 9/11 Commission Recommendations and the National Strategies*. This is the Subcommittee's third hearing on 9/11 Commission recommendations.

## **DISCUSSION OF HEARING ISSUES**

### **1. What is the implementation status of 9/11 Commission's civil liberties recommendations?**

Successful implementation of the 9/11 Commission's three civil liberties recommendations depends upon the effectiveness of the Privacy and Civil Liberties Oversight Board, which in turn depends on legislation currently under consideration.

The three civil liberties-related recommendations have been implemented by the White House, to a point. The 9/11 Commission Report itself did not specify makeup or structure or particular products of such a Board, only that "there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties." (**Web Resource 1**) The Privacy and Civil Liberties Oversight Board's responsibilities encompass the other two recommendations, including safeguarding individuals' privacy under information sharing, and holding the executive branch accountable for burden of proof that governmental power enhances security and is subject to adequate oversight.

At this time, the Board has been created, is hiring staff, has convened frequently over the past two months, and is meeting with relevant government and nongovernmental groups. Past criticism on the slow pace of the implementation of this recommendation is not applicable to the current Board members, who were unable to act until the Senate confirmed Board leaders. However, the present structure of the Board, and particularly its powers to thoroughly investigate and create a measurable impact with the aim of protecting civil liberties, continue to come under question.

The Board products are currently limited to providing "advice and...recommendations to the President and executive branch department and agency heads, as appropriate, and [the Board] has access to all relevant information necessary to fulfill its vital advisory role. Additionally, the Board makes an annual report to Congress." (**Web Resource 11**) While such a product is certainly necessary, there is presently no mechanism to ensure reception of the Board's advice, and, further, no guarantee that the Board will in fact have access to "all relevant information" because its

investigative powers can be blocked by the Attorney General. This is not enough.

Critics say treatment of the 9/11 Commission's civil liberties recommendations are an example of White House inaction, or tepid action on recommendations with which they are not in agreement. The accountability mechanism present in H.R. 5017, Ensuring Implementation of the 9/11 Commission Report Act, and particularly the language inserted from H.R. 5000, 9/11 Commission Civil Liberties Board Act, can help ensure the Board can effectively perform its role and fulfill the recommendations of the 9/11 Commission. **(Web Resource 8)**

## **2. What steps can be taken to ensure a consistent balance between civil liberties and national security needs?**

At the core of the civil liberties vs. national security argument is a lack of consensus over what constitutes a balance. At the most basic level, this debate is presented as security *versus* civil liberties. One side of the argument equates governmental control over civil liberties with absolute power, framing it as a concept counter to the constitutional system of checks and balances. The other position argues that government can be trusted with additional power, and that a focus on civil liberties compromises national security.

A recent Stratfor opinion article elaborates the terms of a potential debate:

The trade-off between liberty and security must be debated. The question of how you judge when a national emergency has passed must be debated. The current discussion of NSA data mining provides a perfect arena for that discussion. We do not have a clear answer of how the debate should come out. Indeed, our view is that the outcome of the debate is less important than that the discussion be held and that a national consensus emerge. Americans can live with a lot of different outcomes. They cannot live with the current intellectual and political chaos.

Civil libertarians must not be allowed to get away with trivializing the physical danger that they are courting by insisting that the rules of due process be followed. Supporters of the administration must not be allowed to get away with trivializing the threat to liberty that prosecution of the war against al Qaeda entails. No consensus can possibly emerge when both sides of the debate are dishonest with each other and themselves.

**(Attachment 10)**

The 9/11 Commission report offers theoretical rather than specific guidance on how a balance should be legislatively achieved between security and civil liberties:

We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that

insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend. **(Web Resource 1)**

Some argue that complaints about restriction of civil liberties are illegitimate because while there is a war cry against intelligence gathered by federal agencies to protect the nation, approximately the same intelligence is gathered, sold, and used by marketing agencies in their research and business. Regarding the National Security Agency's program, one editorial feared that "...we will have to give up our most potent line of defense because of largely hypothetical concerns about privacy violations."  
**(Attachments 11-12)**

Others contend that the freedom of civil liberties serves as an "antidote to violent extremism." In testimony before the Senate Judiciary Committee quoted by the FAS Project on Government Secrecy, former CIA Deputy Director for Intelligence John C. Gannon stated, "I believe that the hard-won Constitutional freedoms enjoyed by Americans, along with our unparalleled commitment to civil liberties embedded in law, work against the development of domestic terrorist networks that could be exploited by foreigners." **(Attachment 13)**

The past year has presented several instances of concrete situations of a choice involving civil liberties and national security. In all these instances, rhetoric about balance and theories of civil liberties have come face to face with the reality of programs—wiretapping and data mining, for example—requiring concrete decisions.

Sharper teeth for the White House Privacy and Civil Liberties Oversight Board will help offset criticism and keep civil liberties in the eye of the public and the press as steeper security measures are necessarily implemented and maintained.

Finally, a continuing focus on legislative implementation of 9/11 Commission recommendations through H.R. 5017 and other pieces of legislation, will help ensure both that civil liberties concerns are allayed and all areas of American national security are adequately strengthened.

## **WITNESS TESTIMONY**

Witnesses were told that the purpose of the hearing is to examine the implementation status of the civil liberties recommendations within the context of broader 9/11 Commission recommendations.

The Honorable Thomas H. Kean and the Honorable Lee H. Hamilton are expected to discuss H.R. 5017, Ensuring Implementation of the 9/11 Commission Report Act, for which they have jointly offered a letter of support.

Chairman Carol E. Dinkins was asked to discuss the mission of the Privacy and Civil Liberties Oversight Board and its operations; the authority of the Board in its oversight functions; and what concrete action the Board can take when it discovers a problem. She has been asked expected to elaborate on points of criticism directed against the Board's structure, including the Attorney General's authority to block investigative powers of the Board and the Board's lack of subpoena power. Finally, she will discuss resources and assistance the Board needs in order to function at maximum capacity. Vice Chairman Alan Charles Raul will accompany Chairman Dinkins.

Five family members of 9/11 victims have been invited to testify: Ms. Mary and Mr. Frank Fetchet; Ms. Carol Ashley; Mr. Abraham Scott; and Mr. Donald Goodrich.

Family members have been invited to discuss the civil liberties recommendations put forth in the 9/11 Commission Report and their implementation. In addition, they will share views on other Commission recommendations and their implementation.

## **WITNESSES**

### **Panel One**

**The Honorable Thomas H. Kean**

Chair, National Commission on Terrorist Attacks Upon the United States  
President, THK Consulting

**The Honorable Lee H. Hamilton**

Vice Chair, National Commission on Terrorist Attacks Upon the United States  
Director, The Woodrow Wilson International Center for Scholars

### **Panel Two**

**The Honorable Carol E. Dinkins**

Chairman  
Privacy and Civil Liberties Oversight Board  
The White House

Accompanied by:

**The Honorable Alan Charles Raul**

Vice Chairman  
Privacy and Civil Liberties Oversight Board  
The White House

### **Panel Three**

**Mrs. Mary Fetchet**, New Canaan, CT.

Mother of Brad, an employee of Keefe, Bruyette and Woods in Tower 2 of the World Trade Center.

**Mrs. Carol Ashley**, Rockville Centre, NY.

Mother of Janice Ashley, an employee of Fred Alger Management in the World Trade Center.

**(Continued on next page)**



**Panel Three (Cont'd)**

**Mr. Frank Fetchet**, New Canaan, CT.

Father of Brad, an employee of Keefe, Bruyette and Woods in Tower 2 of the World Trade Center.

**Mr. Abraham Scott**, Springfield, VA.

Husband of Janice Marie Scott, an employee of the Pentagon.

**Mr. Don Goodrich**, Bennington, VT.

Father of Peter Goodrich of Boston, a passenger on board United Flight 175 that crashed into the World Trade Center.

## ATTACHMENTS

1. Text of H.R. 1310, Protection of Civil Liberties Act.
2. Text of H.R. 5000, 9/11 Commission Civil Liberties Board Act.
3. Text of “Dear Colleague” letter in support of H.R. 5000, Protection of Civil Liberties Act.
4. Text of “Dear Colleague” letter in support of H.R. 5017, Ensuring Implementation of the 9/11 Commission Report Act.
5. Final Report on 9/11 Commission Recommendations one-page summary of grades.
6. *Watchdog: What Ever Happened to the Civil Liberties Board?* Isikoff, Michael. Newsweek, 3/13/06.
7. *Privacy Board Inspired by 9/11 Commission May Be Underfunded, Neglected.* Yoest, Patrick. CQ Homeland Security, 3/17/06.
8. *Oversight Board Needs Authority, Resources.* Keene, David and David Cole. Miami Herald, 4/24/06.
9. ACLU Press Release, 4/27/06: ACLU Leaders Meet with White House Privacy and Civil Liberties Board, Call for Board to Exercise Strong, Independent Role.
10. *Civil Liberties and National Security.* Friedman, George. Stratfor Geopolitical Intelligence Report, 5/16/06.
11. *Forget Privacy, We Need to Spy More.* Boot, Max. Los Angeles Times, 5/17/06.
12. *Action Urged as US Civil Liberties Board Convenes.* Drees, Carolyn. Reuters News, 5/28/06.

13. *Civil Liberties as an Antidote to Violent Extremism*. Secrecy News, FAS Project on Government Secrecy, v.2006, Issue No. 55, 5/8/06.

## WEB RESOURCES

1. Report of the National Commission on Terrorist Attacks Upon the United States, Chapter 12.  
[http://www.9-11commission.gov/report/911Report\\_Ch12.pdf](http://www.9-11commission.gov/report/911Report_Ch12.pdf)
2. Congressional Research Service: Privacy and Civil Liberties Oversight Board: 109<sup>th</sup> Congress Proposed Refinements  
<http://www.congress.gov/erp/rs/pdf/RS22078.pdf>
3. Executive Summary of the Final Report of the National Commission on Terrorist Attacks Upon the United States.  
<http://www.gpoaccess.gov/911/pdf/execsummary.pdf>
4. 9/11 Commission Caucus, U.S. House of Representatives  
<http://maloney.house.gov/911caucus/>
5. S. 2845, Intelligence Reform and Terrorism Prevention Act of 2004  
<http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108Nm5Gne::>
6. H.R. 10, 9/11 Recommendations Implementation Act  
<http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108Lp60hp::>
7. The Privacy Office of the U.S. Department of Homeland Security  
[http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0338.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0338.xml)
8. Text of H.R. 5017, Ensuring Implementation of the 9/11 Commission Report Act  
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